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In the Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., ET AL., PETITIONERS

v.

FLETCHER L. THOMPSON, dba FLETCHER L. THOMPSON REALTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court erred in entering summary judgment on respondents' claim that requiring real estate brokers to join a local Board of Realtors in order to obtain access to the Board's multiple listing service violates Section 1 of the Sherman Act, 15 U.S.C. 1.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Petitioner Metropolitan Multi-List, Inc. (Metro) operates a multiple listing service (MLS) in Atlanta, Georgia. Real estate brokers who participate in the MLS submit information about properties that are listed for sale with that broker. Metro compiles the information and makes it available to all its participating brokers. Any broker who produces a buyer for a listed property is entitled to share the resulting sales commission with the broker who submitted the listing to the MLS. It is very difficult for real estate brokers to compete effectively without access to an MLS. Indeed, "[b]rokers

consider the use of a multilist system a necessity." Pet. App. 2a.

Metro is a wholly owned subsidiary of petitioner DeKalb Board of Realtors (DeKalb), a member of the National Association of Realtors (NAR). DeKalb limits participation in Metro's MLS to real estate brokers who are members of DeKalb or another local branch of the NAR, such as the Atlanta Board of Realtors. Membership in a local Board of Realtors is open to any licensed real estate broker. The Board charges an annual membership fee. In addition, Board members must pay a deposit and various fees to Metro in order to participate in the MLS. Pet. App. 2a; Pet. 2-3.

Respondent Thompson is an Atlanta real estate broker who does not wish to join the Atlanta Board of Realtors. He is a member of respondent Empire Real Estate Board, Inc. (Empire). Empire is a membership organization that was founded to serve black real estate brokers in 1939, at a time when Boards of Realtors excluded black real estate brokers from membership. Empire provides many of the same services as a local Board of Realtors, but it does not operate an MLS in the Atlanta area. In 1988, Thompson applied for access to Metro's MLS. His application was rejected because he was not a member of a Board of Realtors. Pet. App. 3a; Pet. 5-6.

2. In 1988, Thompson and Empire filed an action against Metro and DeKalb, alleging that Metro's rule requiring membership in a Board of Realtors violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and the Fair Housing Act, 42 U.S.C. 3604, 3606. The district court granted summary judgment for Metro and DeKalb on all claims. Pet. 6-7. The court rejected respondents' claim that the membership requirement is a tying arrangement that is illegal per se under Section 1 of the Sherman Act. The court concluded that respondents had presented insufficient evidence that petitioners had market power in a relevant market or that Metro had an economic interest in the Atlanta Board of Real-

tors. Pet. App. 34a-37a. In addition, the district court found insufficient evidence of market power to support respondents' rule of reason claims under Section 1. Pet. App. 38a-40a. The district court also granted summary judgment for petitioners on the Section 2 claims. The court rejected respondents' "essential facilit[ies]" claim because it found that there was competition in the market for MLS services. And the court concluded that there was insufficient evidence of intent to monopolize to support a Section 2 conspiracy claim. Pet. App. 37a-38a, 41a-42a.[1]

3. The court of appeals affirmed the district court's entry of summary judgment for petitioners on the Section 2 claim, but reversed the entry of summary judgment on the Section 1 claims. Pet. App. 1a-30a. The court first held that respondent Thompson has standing to litigate the tying claim and group boycott claims, and that Empire has standing to litigate those claims as well as the conspiracy to monopolize claim. Pet. App. 4a-7a.

The court then turned to defining the relevant market. It agreed with the district court that the relevant product market is the market for multilist services. But the court of appeals concluded that there are disputed issues of material fact as to the scope of the relevant geographic market. Pet. App. 8a-9a. In particular, the court of appeals observed that respondents had presented "considerable evidence suggesting that Atlanta is not a homogeneous real estate market," that "brokers specialize in different areas of the city," and that respondents "specialize in real estate located on the south side of Atlanta." Pet. App. 10a-11a.

a. The court of appeals concluded that summary judgment was inappropriate on respondents' tying claim. The court analyzed the issue in light of what it stated were the "four basic elements of a *per se* tying claim":

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[1] The district court also granted summary judgment for petitioners on the Fair Housing Act claims. Pet. App. 42a-43a. Respondents did not appeal from that ruling. Pet. App. 4a n.2.

> 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those [two] products are in fact "tied" together—that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Pet. App. 11a-12a (quoting *Tic-X-Press, Inc.* v. *Omni Promotions Co.*, 815 F.2d 1407, 1414 (11th Cir. 1987)). The court also considered a "fifth requirement that the tying company have an economic interest in the tied product. Pet. App. 12a. The court found that respondents had made out a prima facie case on all five elements.

As to the first factor, the court said that whether multiple listing services and professional association membership are separate products turns on whether there are separate markets for the two. Pet. App. 12a (citing *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984)). The court found that there was sufficient evidence of separate product markets to defeat summary judgment. In particular, the court cited

> evidence that the bill for joining the Realtors is separate from Metro's bill; that a broker can join the Realtors and choose not to use the multilist service; that, within Atlanta, there are at least two professional groups [Empire and the Atlanta Board] competing for members; that some local Realtor groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors who imposed the Realtor membership requirement; and that in other [geographic] markets, multilist services are independent of professional membership.

Pet. App. 14a-15a.

Second, the court noted that the existence of a tie is undisputed, since Metro's MLS is admittedly available only to members of a Board of Realtors. Pet. App. 15a.

Third, the court found sufficient evidence that Metro had power in the multiple listing services market that could be used to coerce buyers to accept the tied product. The court pointed to evidence that multiple listing services are necessary to real estate brokers, and that there is a geographic market in which Metro operated the only MLS. Pet. App. 17a-18a. The court acknowledged that a competitor could purchase the physical assets needed to operate an MLS, but noted that there was evidence that "a new multilist service needs to build a substantial number of listings before it can become useful," and that "Metro has built an insurmountable amount of good will." Pet. App 18a. The court found sufficient evidence of coercion in the fact that Metro requires Board of Realtors membership and in affidavits indicating that (1) some members of the Boards of Realtors would give up their memberships but for the requirement, (2) some Empire members wanted access to Metro but could not afford both Empire and Board of Realtors membership, and (3) one Empire member wanted Metro access but did not want to join a Board of Realtors because of "their past history of discriminati[on] against African Americans." Pet. App. 19a.

Fourth, the court found sufficient evidence of a not insubstantial effect on interstate commerce in the tied market (professional association membership), since there was evidence that Empire's annual loss of dues amounts to at least $30,000. Pet. App. 20a-21a.

Finally, the court found sufficient evidence that Metro, a wholly owned subsidiary of the DeKalb Board, has an economic interest in the Atlanta Board, even though the court did not find that the Atlanta Board pays any portion of the dues or other funds it receives to the DeKalb Board or Metro. Pet. App. 21a-22a.

b. The court of appeals viewed respondents' rule of reason claim under Section 1 as alleging an unlawful group boycott that was not per se unlawful because of the "pro-competitive effects inherent in multilist services,"

Pet. App. 4a, 23a.[2] The court held that respondents had presented sufficient evidence to defeat summary judgment on this claim as well. Relying on its earlier decision in *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), the court asserted that, if market power is shown, "where a broker is excluded from a multiple listing service with the requisite market power without an adequate justification in the competitive needs of the service, both the broker and the public are clearly harmed. [I]n these circumstances, the exclusion from the association will be found to violate Section 1" of the Sherman Act. Pet. App. 24a (quoting *Realty Multi-List*, 629 F.2d at 1371).

The court concluded that respondents had presented sufficient evidence of market power to survive a motion for summary judgment on the group boycott claim. In the group boycott context, the court ruled, market power turns on whether a multilist service has "sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms." Pet. App. 24a. The court recognized that the goal of inducing individual brokers to join the MLS is a legitimate, procompetitive justification for restrictions and that provisions of the Realtor code of ethics prohibiting brokers from soliciting each other's listings and requiring them to arbitrate disputes are "reasonable and narrowly tailored" to that end. Pet. App. 27a. The court further held, however, that a requirement of Realtor membership is "not narrowly tailored to the goal of inducing brokers to join the multilist system," because "Metro could easily impose its own 'no solicitation' and arbitration rules on its members." *Ibid.* Accordingly, the court concluded that if the district court finds on remand that Metro has

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[2] Respondents' complaint did not expressly allege an unlawful group boycott, and the district court did not analyze respondents' claim in those terms. In *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), however, antitrust claims involving MLS membership requirements were analyzed as a group boycott. See 629 F.2d at 1354.

market power, "it must find that the Realtor membership requirements are an illegal group boycott." Pet. App. 28a. The court added, however, that "the Realtors are free on remand to raise other justifications for the realtor membership requirements." Pet. App. 28a n.13.

DISCUSSION

We agree with the court of appeals that "multilist services have many pro-competitive effects." Pet. App. 23a. In particular, multilist services "help eliminate imperfections in the marketplace by increasing the availability of information." *Ibid.* We are therefore troubled by the court of appeals' failure to acknowledge the significance of potential procompetitive justifications for a rule that restricts participation in an MLS to members of a local Board of Realtors. At a minimum, the court's analysis is incomplete, and may, in consequence, encourage (or prolong) unwarranted antitrust challenges to association membership requirements.[3] In addition, we believe that the court's analysis of respondents' tying claims does not take full account of the rationale of this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, *supra*. Despite these analytical defects, the court of appeals' interlocutory decision creates no square conflict with a decision of this Court or a court of appeals. Accordingly, further review is unnecessary at this juncture.

1. Practices are held to be per se unlawful "because of their pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958). A rule restricting benefits offered by a voluntary association to members of the association

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[3] Petitioners have informed us that there are 176 local Boards of Realtors in the Eleventh Circuit, and that 111 of those Boards operate MLSs. As a result of the court of appeals' decision, these Boards are considering whether to amend their bylaws to permit non-member brokers to participate in MLSs. The court of appeals' decision may also encourage challenges to membership requirements in other parts of the country.

does not always, or even usually, have anticompetitive effects. Indeed, there may be important and legitimate reasons for such restrictions.

A voluntary association is a group organized to further some common interest or interests of its members. In many cases, an association's success in furthering its members' interests also benefits non-members who share those interests. A non-member who concludes that his participation is unlikely to make a significant difference to the association's prospects of achieving its goals, and who can enjoy the benefits of the association's efforts without incurring the costs of membership, will find it economically rational not to join. See generally M. Olson, *The Logic of Collective Action* (1965). But if no one joins, no benefits will be achieved.[4]

One way for a voluntary association to induce potential members to join rather than free-ride on the association's efforts is to provide some benefits that are restricted to members, such as an MLS. See M. Olson, *supra*, at 132-134; American Society of Association Executives, *et al.* Amicus Br. at 6. Benefits restricted to members serve as effective inducements to membership only if they are of significant value to potential members who would not otherwise join the association. Consequently, there will inevitably be potential members who would prefer to obtain such benefits by paying separately for them rather than by joining the association. But if an association were required to make every service or benefit it provided available to non-members, there might be no members, no association, and thus none of the procompetitive benefits the association offers. See Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A.J. 27, 32 (1968) ("[A]n associa-

[4] This is an example of the "free rider" problem that the Court has recognized in the context of non-price vertical restraints. See *Business Elec. Corp.* v. *Sharp Elec. Corp.*, 485 U.S. 717, 725 (1988); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977).

tion cannot continue to exist if its activities are completely and unconditionally opened to outside participation. It is only through its activities that an association attracts and holds membership."). Accordingly, courts should be very cautious about characterizing practices in this area as per se illegal. Cf. *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 21-24 (1979) (agreement on price not per se unlawful if necessary to market product at all).

There may well be procompetitive justifications for limiting access to an MLS to members of a Board of Realtors. Such a membership rule may be necessary to induce a sufficient number of real estate brokers to join the Board and contribute to the cost of activities that benefit real estate brokers generally. Or it may be substantially more efficient to limit MLS participation to Board members. In some circumstances, however, it is possible that such a membership requirement could have anticompetitive effects. An MLS, unlike most services offered by trade associations, is a form of horizontal collaboration in the actual conduct of the participants' business activities. Indeed, an MLS is a prime example of a form of collaboration among competitors that can provide competitive efficiencies to the benefit of consumers. Cf. *Broadcast Music, Inc.* v. *CBS, Inc.*, *supra*. But those very benefits and efficiencies can significantly diminish the ability of those without access to the MLS to compete. Consequently, if the participants in an MLS were to place unreasonable burdens on access to that service, their conduct could transform a competitively beneficial form of horizontal collaboration into an instrument of concerted conduct that stifles competition.

We are not in accord with petitioners' apparent suggestion (Pet. 12) that membership rules restricting access to competitively important services such as an MLS are per se legal under the antitrust laws if they are (1) nondiscriminatory and (2) "reasonable," in the sense that membership fees accurately reflect the cost of the

full range of benefits and services that the association provides. Under that standard, a Board of Realtors would be free to impose on real estate brokers the cost of additional services—including services only remotely or tangentially related to members' professional activities—that the broker would not choose to purchase. Imposing such unrelated costs could, at least in theory, raise the price of access to the MLS beyond the means of brokers willing to pay the reasonable cost of the MLS itself. In other circumstances, imposing unrelated costs could place some brokers at a competitive disadvantage by requiring them to pay for services of less value to them than to their competitors. Even membership costs that burdened all brokers equally could have the effect, in theory, of facilitating a general price increase in the market for brokers' services. Accordingly, antitrust claims in this area should be resolved "on a case-by-case basis, focusing on the 'particular facts disclosed by the record,'" rather than on the basis of a per se rule. *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, No. 90-1029 (June 8, 1992), slip op. 13 (quoting *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 579 (1925)).[5]

Properly applied, the antitrust laws seldom should prevent a trade association from deciding for itself on the particular package of services and benefits it wishes to extend to members. As we discuss below, see pp. 14-

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[5] That is not to say that such cases cannot be resolved at the summary judgment stage. See generally *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-588 (1986). In this case, however, the potential procompetitive justifications for a membership requirement, and its possible anticompetitive effects, have not been well developed in the record. As the Court recently noted in somewhat similar circumstances in *Eastman Kodak*:

> We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. * * * In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment.

Slip op. 26.

18, *infra*, per se tying analysis is rarely appropriate in this context. Under the rule of reason, moreover, the fact that an association chooses to offer a particular bundle of services and benefits to its members may have procompetitive effects, and will seldom have significant anticompetitive effects. Even if access to one of the services offered by a trade association is necessary to allow members and their competitors to compete effectively, the pertinent question is not whether other parts of the package are necessary to the competitively necessary service, see note 6, *infra*, but whether the entire package is unreasonable, in the sense that it has anticompetitive effects that outweigh its procompetitive effects. See *Eastman Kodak Co.*, slip op. 33.

2. Petitioners contend (Pet. 12-19) that the court of appeals' decision conflicts with this Court's decisions in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898). We do not agree. Respondents are challenging a rule that denies them access to an MLS unless they pay membership dues to the Board of Realtors. The cases on which petitioners rely do not go so far as to hold that such a requirement is per se legal if membership is open to any real estate broker and the dues accurately reflect the costs of the full range of services and benefits provided to members.

In *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Court affirmed the entry of summary judgment against the Associated Press (AP), an association of newspapers that "prohibited [its] members from selling news to non-members, and * * * granted each member powers to block its non-member competitors from membership." 326 U.S. at 4. The Court focused on the rules that permitted AP members to exclude their competitors from membership, and held that an association of competitors may not restrict access to a competitively important service to members of the association if the restrictions are "designed to stifle competition." 326 U.S. at 19. In this case, membership in a Board of

Realtors is open to any licensed broker, and there appears to be no evidence that the membership rule is "designed to stifle competition." But the *Associated Press* decision does not address membership rules that, even if not intended to stifle competition, nevertheless may affect competition by imposing on would-be users costs unrelated to a service regarded as a "necessity." Pet. App. 2a. We recognize that the *Associated Press* Court rejected the government's contention that the AP should be required to grant non-members access to its services. 326 U.S. at 21-22. But the Court did so because "the government chose to present its case on the narrow issues which were within the realm of undisputed facts," and the Court was unable to conclude "[i]n the situation thus narrowly presented * * * * that the [district court's] decree should have gone further than it did." *Id.* at 22. The Court observed that the government was free to reopen the question in the district court "[i]f * * * the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers." *Ibid.*

Similarly, in *Anderson* v. *United States*, 171 U.S. 604 (1898), an early antitrust decision concerning a livestock exchange, the Court did no more than approve an organization whose members agreed to do business only with other members, where "[e]very one [could] become a member of the association" and the membership rule reasonably furthered the legitimate purposes of the association. *Id.* at 619-620. *Anderson* does not suggest that the members of the exchange could have placed unreasonable burdens on access to the exchange by requiring would-be competitors to pay significant fees for services unrelated to the operation of the exchange.[6]

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[6] Although we disagree with petitioners' contention that the court of appeals' decision conflicts with decisions of this Court, we also disagree with respondents' suggestion (Br. in Opp. 4 n.5) that *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), and *Abood*

Petitioners' contention (Pet. 10, 13-15) that the decision in this case conflicts with *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), is also unpersuasive. The plaintiffs in *Pope* brought an action against a local Board of Realtors challenging the Board's decision to assess dues based on the number of agents employed by each member agency. The court of appeals noted that the plaintiffs "d[id] not challenge the amount of fees the board collects," but only "the apportionment of the fees among the board members." 872 F.2d at 130. The court held that it was reasonable to charge the plaintiffs "half the cost of running the MLS" because they "controlled approximately half the real estate market" and "[o]ne half of the listings will likely be theirs." *Id.* at 131. Thus, *Pope* did not hold that an association may deny access to a competitively necessary service to those who are unwilling or unable to pay substantial additional costs for an unreasonable package of other services or activities. Indeed, the court explained that its decision in *Realty Multi-List* held that

> a MLS could not collect more dues than was reasonably necessary to run the MLS service. * * * To collect more than the cost of the service creates a barrier to the admittance of any new member and is without competitive justification. * * *

872 F.2d at 130 (citing *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1368-1369 (5th Cir. 1980)).[7]

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v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), make it unlawful under the antitrust laws to burden membership in an MLS with any fees that are not "germane" to the MLS. *Ellis* and *Abood* are not antitrust cases; those decisions rest on principles far removed from the consumer welfare concerns of antitrust law.

[7] Petitioners also contend (Pet. 10, 16) that the court of appeals' decision conflicts with the decisions of the Iowa Supreme Court in *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127 (1981), and the New Jersey Supreme Court in *Pomanowski* v. *Monmouth County Bd. of Realtors*, 446 A.2d 83, cert. denied, 459 U.S. 908

We also disagree with petitioners' contention (Pet. 10, 17) that the court of appeals' decision "conflicts with the position taken by the United States Department of Justice in numerous cases and consent decrees involving local boards and multiple listing services." The government's primary concern in those cases was with rules that excluded realtors from membership in local Boards, not rules that required membership. In at least one case, moreover, the Justice Department obtained a consent decree that prohibited the MLS from "[r]efusing to accept for membership any real estate broker because said broker is not a member of any local, state or national realty board or association." *United States* v. *Multiple Listing Service*, 1972 Trade Cas. (CCH) ¶ 74,221, at 93,022 (D. Or. 1972). In other cases, the consent decrees did not authorize a membership requirement in all circumstances, but merely authorized "reasonable and nondiscriminatory written requirements for membership." See, *e.g.*, *United States* v. *Greater Pittsburgh Bd. of Realtors*, 1973-1 Trade Cas. (CCH) ¶ 74,454, at 94,037 (W.D. Pa. 1973); *United States* v. *Los Angeles Realty Bd.*, 1973-1 Trade Cas. (CCH) ¶ 74,366, at 93, 694 (C.D. Cal. 1973).

3. Petitioners challenge (Pet. 19-24) the court of appeals' analysis of respondents' claim that Metro's membership rule is a tying arrangement that is illegal per se under the Sherman Act. We agree with petitioners that the court of appeals' discussion of the tying claim does not appreciate fully the rationale of this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, *supra*.

(1982). As petitioners recognize (Pet. 16), however, both of those decisions rest on state law. In addition, neither decision supports the broad proposition that association membership requirements are per se legal as long as membership is open to all and fees are a reasonable reflection of the cost of whatever services are provided by the association. Indeed, the New Jersey Supreme Court expressly noted in *Pomanowski* that "there is no contention that the cost [of Board membership] is prohibitively high." 446 A.2d at 92.

Under *Hyde* (and the Court's recent decision in *Eastman Kodak Co.*), per se tying analysis is rarely applicable to a package of benefits and services offered by a trade association to its members.

The Court has recognized that "not every refusal to sell two products separately" is an illegal tying arrangement, let alone a per se violation of the antitrust laws. *Hyde*, 466 U.S. at 11. In many instances, "package sales" are both attractive to buyers and "entirely consistent with the Sherman Act." *Id.* at 12. As an initial matter, a trade association typically lacks the market power required "to force a purchaser to do something that he would not do in a competitive market." *Id.* at 14. Moreover, tying analysis is inappropriate unless there are two separate product markets—that is, "unless * * * it is efficient to offer [the tied product] * * * separately from * * * [the tying product]." *Id.* at 21-22. In addition, even if a trade association possesses market power and there are two separate product markets, per se tying analysis is inappropriate unless "that power is used to impair competition on the merits in another market." *Id.* at 14. Accordingly, per se analysis does not apply "when a purchaser is 'forced' to buy a [tied] product he would not have otherwise bought," because "no portion of the market which would otherwise have been available to other sellers has been foreclosed," and therefore "there can be no adverse impact on competition." *Id.* at 16. See 9 P. Areeda, *Antitrust Law* ¶ 1724(a), at 308-311 (1991).[8]

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[8] The court of appeals found evidence that petitioners' membership requirement has caused Empire to lose nearly 400 members, resulting in an annual loss of dues of $30,000 to $70,000. Pet. App. 20a-21a. This case appears to be unusual, however, because many Boards of Realtors face no local competition in the market for professional association membership. There are more than 1,800 local Boards of Realtors, with a total membership of some 700,000. Federal Trade Commission Staff Report, *The Residential Real Estate Brokerage Industry* 80, 83 (1983) [hereinafter FTC Staff Report]. In contrast, the National Association of Real Estate Brokers—the

In considering whether membership in a professional association of realtors and multilist services are separate products for purposes of a tying claim, the court of appeals focused (Pet. App. 12a-15a) on the evidentiary factors listed in this Court's opinion in *Hyde*. But the Court in *Hyde* considered whether there was "*sufficient* demand for the purchase of [one item] separate from [the other] to identify a distinct product market in which *it is efficient* to offer [the one] separately from [the other]." 466 U.S. at 21-22 (emphasis added). See also *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, slip op. 8 (same). In contrast, the court of appeals' discussion suggests that it might be satisfied with evidence of *any* separate demand and the mere *possibility* of offering the products separately, regardless of efficiency considerations and regardless of whether competition in a market for the tied product can be affected. Pet. App. 14a-15a.[9]

In addition, the court of appeals, in considering whether there is a separate market for professional affiliation, did not take account of other services or benefits afforded to members of Boards of Realtors. See Pet.

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only other significant professional association in the field—has about 5,000 members, or less than 1% of the membership of the NAR. *Id.* at 84.

[9] The court of appeals noted that there were "at least 55 multilisting services operating in the United States that were independent of any local Realtor organization." Pet. App. 15a. But the source on which the court relied points out that 35% of these 55 multilist services nevertheless require Realtor membership. FTC Staff Report at 117. Moreover, the 55 multilist services amounted to less than 6% of all multilist services. *Id.* at 116. In addition, there was evidence that the percentage of multilist services that are independent of Realtor organizations is decreasing. *Id.* at 117-118. These data hardly demonstrate the efficiency of offering multilist services separately from Realtor membership. In contrast, this Court, in considering whether anesthesiological services and hospital services were separate products, noted that only 27% of anesthesiologists had financial relationships with hospitals and that there was a trend toward independent anesthesiological practices. *Hyde*, 466 U.S. at 23 n.36.

App. 14a & n.7; Br. in Opp. App. 1a-7a. The evidence of separate demand for professional affiliation that the court of appeals perceived in the record may have been nothing more than separate demand for other severable services. Only by excluding all benefits for which there is a separate demand could a court determine whether there is a separate market for professional association membership apart from the menu of services that the association offers to its members.

Although we are troubled by the court of appeals' analysis, we disagree with petitioners' contention (Pet. 19-20) that the court of appeals' decision conflicts with the First Circuit's decision in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), cert. denied, 488 U.S. 955 (1988). The court of appeals did not hold that there are two separate products in this case, but only "that summary judgment in favor of the defendant on this element of the claim would be inappropriate." Pet. App. 15a. In any event, the First Circuit in *Wells* rejected the tying claim because the plaintiff "failed to demonstrate the slightest market for membership in real estate boards that might have been affected" by the alleged tie. *Wells*, 850 F.2d at 815. Although the court added that it was "doubtful whether this situation constitutes a 'tie' of separate 'products,'" it expressly stated that "[w]e need not definitively determine whether such a characterization would ever be apt, however, because we affirm the dismissal for the reasons stated above." *Ibid.*[10]

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[10] Petitioners also contend (Pet. 21-23) that the court of appeals erroneously concluded that proof of good will is sufficient to establish a barrier to entry for purposes of the tying claim, and that this conclusion conflicts with *United States* v. *Syufy Enter.*, 903 F.2d 659 (9th Cir. 1990), and *United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984). The court of appeals stated:

> The plaintiffs argue that they have met their burden of production [on barriers to entry] by placing into the record proof that a new multilist service needs to build a substantial number of listings before it can become useful. The plaintiffs argue

In sum, the court of appeals did not hold that Metro's requirement of Board of Realtors membership is a per se unlawful tying arrangement—or, indeed, that it is a tying arrangement between two separate products at all. It held only that respondents had presented sufficient evidence to go to trial on that claim. Despite our reservations about the court of appeals' analysis, we do not believe that it precludes proper consideration of the issues on remand to the district court.

4. Petitioners also contend (Pet. 18) that the court of appeals' rule of reason analysis established "an insuperable and inappropriate 'least restrictive means' standard [that] is tantamount to per se condemnation of the membership requirement [because] [i]t will always be possible for a court to say that an MLS can operate without a requirement of board membership." We do not agree that the court of appeals' opinion must be—or should be—read as an across-the-board endorsement of such a restrictive standard. Indeed, we would strenuously resist any such rigid mode of analysis. See *Premier Elec. Constr. Co.* v. *National Elec. Contractors Ass'n*, 814 F.2d 358, 370 (7th Cir. 1987) (courts applying rule of reason analysis to forms of cooperative behavior are "appropriately

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> that Metro has built an insurmountable amount of good will and the plaintiffs point out that an individual attempted to compete with Metro and that for a variety of reasons, including this good will barrier, his effort failed.

Pet. App. 18a. Read in context, the court of appeals' reference to "good will" may well be no more than a short-hand reference to the alleged "need[] to build a substantial number of listings," (*ibid.*), and the difficulty of doing so where a successful MLS already exists. That interpretation is reinforced by respondents' brief in the court of appeals, which did not mention good will but instead contended that "[m]ultiple listing services tend toward 'natural monopolies.'" Resp. C.A. Br. 21 (citing *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 n.42 (5th Cir. 1980) ("the larger the service, the more effectively it may operate")). The court of appeals' ambiguous statement does not warrant interlocutory review.

modest about their ability to discern the optimal amount of cooperation in any industry"); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987) ("Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment.").

The court of appeals based its analysis of the group boycott claim on its opinion in *Realty Multi-List*, which concluded that restrictions on membership in a multilist service are acceptable under the rule of reason if "reasonably necessary to the accomplishment of * * * legitimate goals and narrowly tailored to that end." Pet. App. 26a (quoting 629 F.2d at 1375). The court concluded in this case that requiring prospective MLS members to subscribe to the no-solicitation rule and the arbitration provision of the Board of Realtors code of ethics would be both reasonably necessary to the legitimate, procompetitive goal of inducing membership in the MLS and narrowly tailored to that end. But the court further concluded that requiring Realtor membership would not be narrowly tailored because "Metro could easily impose its own 'no solicitation' and arbitration rules on its members." Pet. App. 27a. The court therefore held that—assuming Metro has market power—the Realtor membership requirement is unlawful, unless "the Realtors * * * raise other justifications for the realtor membership requirements" on remand. *Id.* at 28a n.13.

The court of appeals expressly left open the possibility that Metro's rule might be justified on remand, even if the district court determines that Metro has market power. The court of appeals did not undertake to anticipate other justifications that might be offered to the district court. For example, the court did not discuss whether a need to discourage free-riding by offering brokers inducements to join a Board of Realtors could justify the challenged rule. Nor did the court discuss the possibility

that it is significantly more efficient to administer and enforce the no soliciation and arbitration rules through the Board of Realtors rather than through the MLS. In addition, the court did not consider whether petitioners must demonstrate that every aspect of Realtor membership is necessary to the legitimate goals of the MLS, or whether it would be sufficient to show that aspects accounting for most of the annual dues are reasonably necessary to the MLS's legitimate goals. See *Realty Multi-List*, 629 F.2d at 1386 ("sizeable membership fee which bears no relation to [the costs necessary to the MLS] may * * * create 'a strong inference that the amount has been set up as a barrier against' new applications"). The court of appeals' interlocutory decision therefore does not foreclose petitioners from introducing evidence on remand that the challenged rule serves legitimate purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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